No. 97-369

Supreme Court, U.S.
FILED
OCT 6 1997
CLERK

In The

Supreme Court of the United States

October Term, 1997

COALITION FOR ECONOMIC EQUITY, et al.,

Petitioners,

v.

PETE WILSON, Governor of the State of California, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO BRIEFS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MARK D. ROSENBAUM
Counsel of Record
DAVID S. SCHWARTZ
TAYLOR FLYNN
DANIEL P. TOKAJI
PETER J. ELIASBERG
ACLU Foundation of Southern California
1616 Beverly Boulevard
Los Angeles, CA 90026
(213) 977-9500

EDWARD CHEN
ACLU Foundation of Northern California
1663 Mission Street, 4th Floor
San Francisco, CA 94103
(415) 621-2493

KAIL MANHEIM
919 S. Albany Street
Los Angeles, CA 90015
(213) 736-1106

KATHLEEN M. SULLIVAN
Crown Quadrangle
Stanford, CA 94305
(415) 725-9875

LAURENCE H. TRIBE
1575 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4621

EVAN H. CAMINKER
405 Hilgard Avenue
Los Angeles, CA 90095
(310) 206-7323

MARTHA F. DAVIS
JULIE GOLDSCHEID
NOW Legal Defense and Education Fund
99 Hudson Street, 12th Floor
New York, NY 10013
(212) 925-6635

Attorneys for Petitioners

October 6, 1997

Additional Counsel Listed Overleaf

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

14 pp

William C. McNeill, III
Julian Gross
The Employment Law Center
1663 Mission Street, Suite 400
San Francisco, CA 94103
(415) 864-8848

Eva J. Paterson
Oren Selstrom
Lawyers Committee for Civil Rights of the San Francisco Bay Area
301 Mission Street, Suite 400
San Francisco, CA 94105
(415) 543-9444

Vikram D. Amar
UC Davis School of Law
Davis, CA 95616
(916) 752-2750

Brad Seligman
The Impact Fund
1604 Solano Ave.
Berkeley, CA 94707
(510) 528-7344

Stewart Kwoh
Julie Su
Asian Pacific American Legal Center
1010 S. Flower Street, Suite 302
Los Angeles, CA 90015
(213) 748-2022

Abby J. Leibman
California Women's Law Center
3460 Wilshire Boulevard
Suite 1102
Los Angeles, CA 90010
(213) 637-9900

Kim W. Pate
Beth Parker
Equal Rights Advocates
1663 Mission St., 4th Floor
(415) 621-0672

Jordan C. Budd
ACLU Foundation of San Diego & Imperial Counties
P.O. Box 87131
San Diego, CA 92138
(619) 232-2121

Elliot M. Mincberg
People for the American Way
2000 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 467-4999

Steven Shapiro
ACLU Foundation
125 Broad Street
New York, NY 10004
(212) 549-2500

Glenn Rothner
Ellen Greenstone
Rothner, Segall, Bahan & Greenstone
200 E. Del Mar Blvd.
Suite 200
Pasadena, CA 91105
(818) 577-0124

TABLE OF AUTHORITIES

Page

CASES

Adarand Contractors Inc. v. Pena, 515 U.S. 200 (1995) 1

Arizonans for Official English v. Arizona, ___ U.S. ___, 117 S. Ct. 1055 (1997) 2

City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) 1, 3

Crawford v. Board of Education, 458 U.S. 527 (1982) 9

Hunter v. Erickson, 393 U.S. 385 (1969) ..... *passim*

Johnson v. Transp. Agency, 480 U.S. 616 (1987)..... 6

Lungren v. Superior Court, 48 Cal. App. 4th 435 (1996) 2

Missouri v. Jenkins, 515 U.S. 70 (1995) 5, 6

Romer v. Evans, ___ U.S. ___, 116 S. Ct. 1620 (1996) 4, 10

Sail'er Inn v. Kirby, 5 Cal. 3d 1 (1971)..... 6

Sheet Metal Workers v. EEOC, 478 U.S. 421 (1986) 6

United States v. Salerno, 481 U.S. 739 (1987)..... 3

United Steelworkers v. Weber, 443 U.S. 193 (1978) 6

Washington v. Seattle School District, No. 1, 458 U.S. 457 (1982)..... *passim*

Wygant v. Jackson Board of Education, 476 U.S. 267 (1986) 1

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const., amdt. XIV ..... *passim*

Title VII of the Civil Rights Act of 1964 6

Cal. Const., art I, sec. 31 (Proposition 209) ..... *passim*

Cal. Educ. Code § 8631 3

Cal. Educ. Code § 52060 *et seq* 3

I

Respondents do not dispute the pressing national significance of this case. Neither respondents Governor Wilson, et al. ("Wilson") nor respondent Californians Against Discrimination Against Preferences, Inc. ("CADAP") denies that Proposition 209 goes further than any state law has ever gone, selectively prohibiting all units of local and state government from even considering race- and sex-based preferences that are constitutionally **permissible**, including those narrowly tailored to redress discrimination or to integrate public schools. Nor do respondents deny that 209 resurrects the otherwise insoluble dilemma resolved by this Court in the line of Fourteenth Amendment cases stretching from *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986), to *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), to *Adarand Contractors, Inc. v. Pena*, 515 U.S. 200 (1995). These decisions create a safe harbor for governmental entities, allowing them to enact narrowly tailored remedial race and sex preferences, without having to confess that they themselves violated the equal protection rights of minorities or women. Proposition 209 destroys this safe harbor, leaving public entities "trapped between the competing hazards of liability to minorities if affirmative action *is not* taken to remedy apparent . . . discrimination and liability to nonminorities if affirmative action *is* taken." *Wygant*, 476 U.S. at 291 (O'Connor, J., concurring) (italics in original). It is also uncontroverted that measures modeled on 209 have been proposed in more than half the states.

Rather than contesting the profound significance of this case, respondents simply deny that this Court's holdings in *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982), and *Hunter v. Erickson*, 393 U.S. 385 (1969), apply to Proposition 209. The lengths to which respondents go to evade the *Seattle-Hunter* holding, and the failure of this effort measured against the "simple yet central principle" set forth in these cases, underscores the case for granting certiorari. We reply briefly to each of respondents' principal arguments.

1. Respondents first argue, contrary to the conclusion reached by both the court of appeals and the district court, that the issues involved in this case are not sufficiently

"concrete" to warrant review without additional state court interpretations of 209. Wilson 3-4 (citing *Arizonans for Official English v. Arizona*, 117 S. Ct. 1055 (1997)).[1]

In marked contrast to *Arizonans*, however, respondents do not and cannot explain how any state court interpretation of 209 could possibly eliminate, or even clarify, the constitutional question whether it imposes "special, and therefore impermissible, burdens on minority interests." *Seattle*, 458 U.S. at 476 n.18. To the contrary, respondents have no choice but to **admit** that "Proposition 209 would eliminate race and gender preferences that are **constitutionally permissible**, but not constitutionally required." Wilson 5-6 (emphasis added); CADAP 5, 18.[2]

For these reasons, both the district court and court of appeals properly answered this Court's question, "Is this conflict really necessary?" (*Arizonans*, 117 S. Ct. at 1072), in the affirmative. Citing the district court's finding that 209 targets constitutionally permissible programs, the court of appeals correctly concluded that: "Unlike in *Arizonans*, the State does not dispute that Proposition 209 operates to eliminate such programs." 110 F.3d at 1438.[3]

---

[1] As the court of appeals noted, there has already been one state court decision interpreting 209. 110 F.3d at 1437 (citing *Lungren v. Superior Court*, 48 Cal. App. 4th 435 (1996)).

[2] At various points in their briefs, respondents misleadingly suggest that petitioners' Fourteenth Amendment argument turns on whether all programs banned by 209 are constitutionally **required**. *See, e.g.*, Wilson 7, 9-10; CADAP 4 & n.5. Clearly they are not, and petitioners have never so argued. The sole issue is whether California may enforce an initiative that precludes all units of state and local government from enacting or maintaining constitutionally **permissible** race- and sex-based preferences.

[3] Wilson respondents' suggestion that this controversy is not sufficiently "concrete," is all the more remarkable given that numerous state and local entities – **including Governor Wilson himself** – have taken steps to abolish programs in conflict with the initiative. As both courts below found, "Defendant/Appellant Pete Wilson, Governor of California, issued an Executive Order on November 6, 1996, implementing Proposition 209 to do just that." 110 F.3d at 1438. Most recently, on

2. Respondents next argue that the initiative's partial redundancy of existing law somehow immunizes it from a facial challenge. Wilson 4-5 (citing *United States v. Salerno*, 481 U.S. 739, 745 (1987)); *see also* CADAP 9 n.8. But in **every** application of 209, the initiative gerrymanders the political process to foreclose participation by those seeking race- and sex-based preferences. Moreover, contrary to respondents' argument, 209's restatement of the pre-existing prohibition against "discriminat[ion]" cannot shield the ban on "preferential treatment" from a facial challenge, for then a state could **always** shield its laws from such challenges by similarly incorporating an existing constitutional rule. Indeed, following respondents' line of reasoning, one could not maintain a facial challenge to an initiative baldly proclaiming: "The state legislature shall not enact any statute beneficial to racial minorities." Because **some** of the statutes banned (e.g., race preferences that fail *Croson* scrutiny, or content-based hate-speech regulations) violate existing constitutional law, the initiative would be constitutional as applied to those

---

September 9, 1997, Governor Wilson issued a list of 35 "Statutes in Violation of Proposition 209" that, in the Governor's words, must be "repealed or rewritten" to conform to the initiative. Among the programs specifically targeted are the California Summer Science and Technology Academy, which "identif[ies] public high school pupils with high academic potential in mathematics, science, and technology, with an emphasis on females and minority members, to participate in university-based research programs" (Cal. Educ. Code § 8631), and the American Indian Early Childhood Education Program which allows the State Superintendent of Public Instruction to apportion funds to be used for educational programs serving the needs of American Indian pupils. Cal. Educ. Code §§ 52060-52065. Governmental entities throughout the state have already begun to dismantle race- and sex-conscious affirmative action programs because of Proposition 209 – including those that have been shown to be narrowly tailored to redress a documented history of discrimination against minorities and women. For example, on September 16, 1997, the County of Contra Costa (one of the named defendants in this case) issued a directive ordering "[t]he County's MBE/WBE Programs for construction contracts, professional/personal services contracts, and purchasing . . . suspended" in light of the fact that "Proposition 209 is no longer stayed by court order."

statutes – yet would obviously be subject to a facial challenge as a racial classification.[4]

3. On the merits, respondents' arguments are irreconcilable with *Hunter* and *Seattle*. Both respondents' briefs confirm that their real complaint is with the "simple but central principle," repeatedly articulated in both cases, that the Equal Protection Clause prevents states from " 'plac[ing] special burdens on racial minorities within the governmental process,' thereby 'making it *more* difficult for certain racial and religious minorities [than for other members of the community] to achieve legislation that is in their interest.' " *Seattle*, 458 U.S. at 469-70 (quoting *Hunter*, 393 U.S. at 391, 395) (italics and brackets in original). The *Seattle* Court held that a state creates an impermissible "racial classification" (458 U.S. at 468, 483, 485) when it "differentiates between the treatment of problems involving racial matters and that afforded other problems in the same area." *Id.* at 480 (citation omitted).[5]

---

[4] This argument also brings respondents into direct conflict with *Seattle*. Initiative 350, of course, prohibited **all** race-conscious busing programs, whether or not they would satisfy equal protection scrutiny. *Seattle*, 458 U.S. at 462-63. The Court nevertheless held the initiative unconstitutional on its face, without considering whether it had some permissible applications to existing busing programs that were not tailored to satisfy Fourteenth Amendment standards. *See also Romer v. Evans*, 116 S. Ct. 1620 (1996) (striking down Colorado initiative on its face, notwithstanding the dissent's undisputed claim, *id.* at 1632-33, that the initiative had some constitutional applications).

[5] *See also, Seattle*, 458 U.S. at 476 n.18 ("The single narrow question . . . is whether the state has exercised its power in such a way as to place special, and therefore impermissible, burdens on minority interests."); *id.* at 485-86 (state action that "places unusual burdens on the ability of racial groups to enact legislation specifically designed to overcome the 'special condition' of prejudice" is "inherently suspect."); *id.* at 468, 476 ("the State may no more disadvantage any *particular* group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote. . . . ") (quoting *Hunter*, 393 U.S. at 393, original emphasis).

Despite *Seattle*'s repeated iteration of this principle, respondent CADAP entirely fails to acknowledge it. Wilson respondents, for their part, acknowledge the principle but then fail to apply it. Instead, respondents argue that 209's burden on the interests of minorities and women is beside the point, because the programs banned by 209 treat people differently based on their race or sex. Wilson 12-14; CADAP 13-15. If this were the test, however, then *Seattle* would have come out the other way. The Washington school districts' use of race-conscious busing **did** of course treat people differently according to race, using race to determine the schools to which students were assigned. *Seattle*, 458 U.S. at 461, 464 n.7. Furthermore, the use of race-conscious busing to eliminate *de facto* rather than *de jure* segregation in school assignments was constitutionally optional, **not** required, and surely no less "constitutionally suspect" than the programs abolished by Proposition 209. *See Missouri v. Jenkins*, 515 U.S. 70, 112 (1995) (O'Connor, J., concurring).[6]

Respondents are equally wrong to attempt to distinguish this case from *Seattle* on the ground that 209 does nothing more than enact a ban on "discrimination" that mirrors the Equal Protection Clause. State 14-15; CADAP i, 1, 4, 17. Far from mirroring the Equal Protection Clause, 209's ban on **all** "preferential treatment" based on race or sex ignores its basic purpose. The very reason for applying heightened equal protection scrutiny to race- and sex-based distinctions (whether in the context of busing or in the context of affirmative action) is to determine whether they promote equality – or,

---

[6] Respondents have no answer to the point that 209, just like Initiative 350, targets race-conscious programs designed to promote integration of public schools. Pet. 6, 19 n.14. While they suggest that there are perhaps some desegregation programs that may not be "preferential" (Wilson 7), they do not and cannot deny that 209 would eliminate magnet schools – or any of the other school desegregation programs documented in the record below – that accord preferences based on race or sex. Because of Proposition 209's dramatic impact on public education, respondent Delaine Eastin, the State Superintendent of Public Instruction, has expressly supported the Petition for Certiorari.

alternatively, whether they constitute invidious discrimination that denies equal protection: "It is only by applying strict scrutiny that we can distinguish between unconstitutional discrimination and narrowly tailored remedial programs that legislatures may enact to further the compelling governmental interest in redressing the effects of past discrimination." *Jenkins*, 515 U.S. at 112 (O'Connor, J., concurring).[7] Respondents' attempt to characterize 209 as an inherently constitutional "antidiscrimination" measure is therefore meritless.[8]

---

[7] This court has consistently recognized that preferential race- or sex-conscious affirmative action is sometimes "the **only** effective way" to eliminate the vestiges of discrimination. *Sheet Metal Workers v. EEOC*, 478 U.S. 421, 449 (1986) (citing cases); *see also Johnson v. Transp. Agency*, 480 U.S. 616, 621-22, 637 (1987); *United Steelworkers v. Weber*, 443 U.S. 193, 208 (1978).

[8] At one point, CADAP admits that 209's "principal effect . . . is to eliminate affirmative action preferences." CADAP 18. In fact, respondents have not identified **any** other effect. Just as minorities were the ones harmed by Initiative 350's ban on racial busing (*Seattle*, 458 U.S. at 474-75), women and minorities are the ones harmed by 209's ban on affirmative action preferences.

For this reason, respondents' attempt to align 209 with state equal protection clauses, state equal rights amendments, and federal antidiscrimination laws is unavailing. CADAP 15-16. CADAP makes the remarkable argument that all these laws "'selectively' condemn racial and gender preferences." *Id.* at 15. Yet the laws cited provide protections for **both** women and men, or for **both** women and minorities. For example, California's equal protection clause, like other states' equal rights amendments, **enlarge** women's protection against discrimination. *See, e.g.*, *Sail'er Inn v. Kirby*, 5 Cal. 3d 1, 17-20 (1971) (recognizing that "[w]omen . . . have historically labored under severe legal and social disabilities" and striking down prohibition against women bartenders). Unlike 209, such laws do **not** merely **preclude** women from seeking remedial affirmative action programs. Likewise, even assuming that the *Hunter-Seattle* principle could apply to **federal** legislation, Title VII protects both minorities and nonminorities from discrimination. By contrast, 209 adds nothing to existing antidiscrimination protections for minorities and women; all it does is to eliminate measures that inure to their benefit, including those narrowly tailored to remedy discrimination.

4. CADAP argues that petitioners seek an unequal political regime or one-way ratchet, under which minorities and women enjoy **superior** rights of participation. CADAP 7, 8, 10-11. As an initial matter, CADAP is wrong to assert that the adherence to the *Hunter-Seattle* principle means that "nonminorities have no [equivalent] equal protection right to be free of state constitutional amendments enhancing the nondiscrimination rights of others beyond the Fourteenth Amendment's floor." CADAP 7. Whites **could**, for example, legitimately challenge, on *Hunter-Seattle* grounds, a state constitutional amendment prohibiting all units of state and local government from ever **repealing** their racial preferences, while leaving those entities free to repeal all other preferences. Such an amendment would selectively – and thus unconstitutionally – close off the political process to whites. While government may structure its political processes along race-neutral lines, it may not lock out **either** whites **or** racial minorities, while leaving those processes open to all others.

Contrary to CADAP's assertion, petitioners have never made the preposterous argument that, under *Hunter* and *Seattle*, "minorities must win every 'important political battle' at the state level." *Id.* at 11. The constitutional defect in 209 has nothing whatsoever to do with political **results**, but inheres in its denial of an equal **opportunity** to participate in the political process. *See Hunter*, 391 U.S. at 395 (Harlan, J., concurring) (law "making it more difficult for certain racial and religious minorities to achieve legislation that is in their interest" is "discriminatory on its face"), *quoted in Seattle*, 458 U.S. at 470.

CADAP therefore misses the point of *Seattle* and *Hunter* when it argues that the Fourteenth Amendment is not "a ceiling establishing the maximum permissible scope of nondiscrimination above which no state may ascend." CADAP 6. *Hunter* and *Seattle* merely hold that the Fourteenth Amendment principle of nondiscrimination applies to **the political process itself**, and not just to the **products** of that process: "what we find objectionable about Initiative 350 is the comparative burden it imposes on minority participation in the political process – that is, the racial nature of the way it

structures the process of decisionmaking." *Seattle*, 458 U.S. at 490 n.23.

5. Nowhere is CADAP's failure to confront *Seattle*'s "simple but central principle" more evident than in their sink-or-swim dependence on a footnote in Justice Powell's dissent and the majority's footnote responding to that dissent. CADAP 12-13; *see Seattle*, 458 U.S. at 480 n.23 (majority), *id.* at 498 n.14 (dissent). CADAP omits most of – and then mischaracterizes – the majority's response in a way that leaves the result and holding in *Seattle* nonsensical.

Justice Powell's dissent asserted that: "After today's decision it is unclear whether the State may set policy in any area of race relations where a local governmental body arguably has done 'more' than the Fourteenth Amendment requires." *Id.* at 498 n.14. Contrary to CADAP's representation, the Court's response was not that the state may **always** thereafter intervene in local decisions regarding matters of race. Rather, the majority responded that the state may intervene "in a race-neutral manner," but may not **selectively** burden the ability of minorities to obtain beneficial legislation. *Id.* at 480 n.23.[9] The majority's response thus does not give states carte blanche to intervene in local matters concerning race. Rather, consistent with numerous statements throughout its opinion, the majority approves those interventions into local decisionmaking that operate in a race-neutral

---

[9] *See* 458 U.S. at 480 n.23 (citations omitted, boldface added):

> [W]hat we find objectionable about Initiative 350 is the **comparative burden it imposes on minority participation in the political process** – that is, the racial nature of the way in which it structures the *process* of decisionmaking. It is evident, then, that the horribles paraded by the dissent – which have nothing to do with the ability of minorities to participate in the process of self-government – are entirely unrelated to this case. It is equally clear, as we have noted at several points in our opinion, that **the State remains free to vest all decisionmaking power in state officials, or to remove authority from local school boards in a race-neutral manner.**

manner – i.e., those that do **not** specially burden race-conscious legislation in a particular area, but also burden other types of legislation in that area.

6. Both respondents mistakenly attempt to align this case with *Crawford v. Bd. of Educ.*, 458 U.S. 527 (1982) (Wilson 19-20; CADAP 19-22), despite the fact that the initiative upheld in *Crawford* – unlike 209 – did not impose **any** burden on minorities' ability to participate in the political process. Proposition I left state and local entities entirely free to adopt racial busing; it simply overruled a prior judicial interpretation of the California Constitution **requiring** racial busing to redress *de facto* (as well as *de jure*) segregation. *Id.* at 536, 547 (Blackmun, J. concurring). After Proposition I, citizens could still lobby local and state school boards to adopt or, for that matter, to rescind their busing programs **voluntarily**. It was precisely on this ground that the Court distinguished *Seattle*. *See Crawford*, 458 U.S. at 536 & n.12. The Court explained that "the simple repeal or modification of desegregation or antidiscrimination laws, **without more**, never has been viewed as embodying a presumptively invalid racial classification." *Id.* at 539 (emphasis added). Quoting directly from *Hunter*, the *Crawford* Court defined that "something more" as the placement of a "special burde[n] on racial minorities within the governmental process." *Id.* at 541. Respondents do not deny that 209 imposes a "special" burden on future attempts to obtain race- and sex-based preferences from any unit of state or local government, no matter how necessary to promote integration or remedy discrimination.

7. At bottom, respondents' arguments rest upon the superficially appealing but ultimately indefensible proposition that "a state may require its subordinate entities to take any action consistent with the Constitution." CADAP 24. As explained above, this position directly conflicts with *Seattle* and *Hunter*, which restrict states from "remov[ing] the authority to address a racial problem – and only a racial problem – from the existing decisionmaking body in such a way as to burden minority interests." *Seattle*, 458 U.S. at

474.[10] It also conflicts with this Court's recent decision in *Romer v. Evans*, 116 S. Ct. 1620 (1996). The *Romer* majority expressly rejected the position, asserted in the dissent and embraced by respondents here, that "a law that is valid in its substance is automatically valid in its level of enactment." *Id.* at 1631 (Scalia, J., dissenting). Instead, *Romer* held that: "Central to both the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that the government **and each of its parts** remain open on impartial terms to all who seek its assistance." *Id.* at 1628. (boldface added). It is just this principle that respondents deny, in arguing that there are **no** limits upon the State's power to lock shut the doors of its "subordinate entities" to those seeking remedial race- and sex-based preferences.[11]

Respectfully submitted,

MARK D. ROSENBAUM*
DANIEL P. TOKAJI
PETER J. ELIASBERG
EVAN H. CAMINKER
EDWARD CHEN
KARL MANHEIM
KATHLEEN M. SULLIVAN
LAURENCE H. TRIBE
VIKRAM D. AMAR
MARTHA F. DAVIS
OREN SELSTROM
**Counsel of record*

---

[10] Without expressly acknowledging the "simple but central principle" enunciated in *Seattle* and *Hunter* (much less the obvious conflict between that principle and its own argument), CADAP urges this Court to "reverse *Seattle*," if the Court disagrees with its assertion that each state has unlimited power to "require its subordinate entities to taken any action consistent with the Constitution." CADAP 24.

[11] It is no answer to assert, as do respondents, that the burden of obtaining a state constitutional amendment is irrelevant, because Proposition 209 merely involves a "substantive" change in the law of the State of California. CADAP 23. Amendment 2 could equally have been characterized as a "substantive" change in state law, to forbid any antidiscrimination protections benefitting gays and lesbians. So too, Initiative 350 (which, like 209, did not mention the political process) could have been characterized – and **was** in fact characterized – as a "substantive" ban on racial busing. *Seattle*, 458 U.S. at 462-63.